

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE:  
NATIONAL PRESCRIPTION  
OPIATE LITIGATION

Case No. 1:17-md-2804  
Cleveland, Ohio

Wednesday, November 7, 2019  
2:26 p.m.

TRANSCRIPT OF STATUS CONFERENCE  
BEFORE THE HONORABLE DAN AARON POLSTER,  
UNITED STATES DISTRICT JUDGE

APPEARANCES: David Rosenblum Cohen,  
Special Master  
  
Francis McGovern,  
Special Master

(Appearances continued to Page 2.)

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Proceedings recorded by mechanical stenography, transcript  
produced by computer-aided transcription.

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1 AFTERNOON SESSION, WEDNESDAY, NOVEMBER 6, 2019 2:27 P.M.

2 THE COURT: This is a status conference in the  
3 opioid MDL. I want to discuss with everyone what the next  
4 steps are. I solicited proposals, recommendations, which  
5 I've received and reviewed.

6 Obviously, and not surprisingly, the parties' counsel  
7 took a different view over how to proceed, and we never  
8 would get agreement on exactly how to proceed, but I wanted  
9 to start off by talking about some principles that I hope we  
10 can agree on. And if we can agree on those, that will sort  
11 of dictate where we go.

12 First and foremost, we have to change the paradigm.  
13 Over the last year we've spent tens of millions of dollars  
14 in attorneys' fees and expenses. Huge expenditures of  
15 special master time, which the parties have paid for, and  
16 judicial resources, which the taxpayers have paid for.

17 We went up to the brink of trial and then we had what  
18 I'll call a one-off settlement, which that's what we had.  
19 It's great for Cuyahoga and Summit County. And we also have  
20 one global settlement that's being hotly disputed in  
21 bankruptcy court.

22 This model isn't sustainable. If I want to use a  
23 biblical model, I'd have to be Methuselah and live a  
24 thousands years, and do this one year at a time, that being  
25 facetious. So we can't keep doing it that way.

1           So it seems to me that I hope we can all agree on the  
2 following principles: That the Court should facilitate  
3 global settlements when all parties are willing to negotiate  
4 one. If the parties don't want to, the parties don't have  
5 to.

6           So it takes the plaintiffs, it takes the state AGs --  
7 by plaintiffs, I mean the cities and counties, the  
8 plaintiffs in my MDL cases -- and at least one defendant.  
9 It could be more defendants, but at least one. All right?  
10 The Court doesn't force any settlements, but it's my job to  
11 facilitate them if all parties want them.

12           Then we need to prepare and, if necessary, try a small  
13 number of focused streamlined cases. And by focused, I mean  
14 cases that are just manufacturers, just distributors, just  
15 pharmacies, with one or two legal theories that can be tried  
16 in my view in about a month. And the results should inform  
17 everyone on the strengths and weaknesses of the plaintiffs'  
18 cases and the strengths and weaknesses of the defendants'  
19 cases, and how certain experts play out in front of a jury,  
20 and certain documents, whatever, which should inform  
21 everyone on going forward.

22           And in the event the plaintiffs would win, the damage  
23 and/or abatement award could be informative. That's if and  
24 only if they would win. That should be a reasonable  
25 principle we all should agree on.

1           And the third one I hope we can all agree is that we  
2           need to effectively utilize my resources and the resources  
3           of my team, which is the three special masters and their  
4           assistants.

5           So does anyone have a disagreement with any of those  
6           what I'll call general principles? If so, I'd like to hear  
7           your disagreement. (Pause.)

8           All right. By everyone's silence, I'm going to take  
9           silence as being agreement with those three principles. I  
10          mean, if someone has a disagreement, I want to hear from it.  
11          I put these out, I thought they would be generally  
12          applicable, but I may be wrong.

13                       MR. SOLOW: Your Honor, Andrew Solow on behalf  
14          of the manufacturers.

15           To be clear, Your Honor, in concept, the second  
16          principle about streamlined cases must come with caveats.  
17          As set forth in our paper, the position paper of the  
18          manufacturers and distributors, we do not believe it's  
19          appropriate to sever cases either by defendants or causes of  
20          action. So to the extent you are looking for us to consent  
21          to that, we do not. We've laid down our objection to that,  
22          and we stand by it.

23                       THE COURT: What is your objection?

24                       MR. SOLOW: We don't believe it's proper at  
25          any point in the case for the plaintiffs to choose to only

1 proceed against certain defendants or on certain causes of  
2 action, and leave those remaining defendants or causes of  
3 action for a future time.

4 If they want to streamline the case by dismissing  
5 defendants or causes of action with prejudice, that's how  
6 you proceed. But we don't think it's appropriate for a  
7 plaintiff to bring a lawsuit, for example, and say we're  
8 going to try the nuisance case cause of action and we're  
9 just going to let the remaining causes of action sit around.

10 THE COURT: The causes of action, you proceed  
11 on causes of action; if they're dropped, they're dropped.  
12 All right? I agree with you. We're not going to say go  
13 against McKesson first on public nuisance and then next  
14 month you go against McKesson on conspiracy. No one is  
15 suggesting that.

16 But are you saying that if there are hypothetically 25  
17 defendants, all right, then you either have a trial with all  
18 25 defendants or you don't have a trial at all?

19 MR. SOLOW: Your Honor, our position is set  
20 forth in our papers, is that --

21 THE COURT: I'm asking you that.

22 MR. SOLOW: And I'm answering, Your Honor --  
23 is severance should be only considered after discovery is  
24 completed. It is prejudicial for parties to be sidelined  
25 and not participate in discovery, pretrial motion practice,

1 and then at a later time be stuck with a case that they did  
2 not participate in.

3 So we think if a severance decision is going to happen  
4 about defendants, not causes of action as Your Honor has  
5 conceded, that's a decision that should not be made up front  
6 at the beginning portion of a case.

7 THE COURT: Well, no one would be stuck with a  
8 case if you hadn't participated. If there was a  
9 trial -- just say, all right, just say there are ten  
10 defendants, and the Court says it's unmanageable, unworkable  
11 to try ten cases, to try against ten defendants, so we're  
12 doing five. Okay?

13 We try that five, and then if at some future point the  
14 other five are tried, they'd start again. You'd have new  
15 discovery. There wouldn't have been discovery against those  
16 five, those five wouldn't have had discovery against the  
17 plaintiffs.

18 Obviously the documents are the documents, but you  
19 wouldn't have to try a case with no discovery.

20 Well, all right.

21 MR. SOLOW: We made our position clear, Your  
22 Honor.

23 MR. STOFFELMAYR: Your Honor, may I raise one  
24 point briefly? Kaspar Stoffelmayr, liaison counsel for the  
25 pharmacy defendants, but I don't want to pretend I speak on

1       behalf of everybody.

2               But you know, I understand the practical issues with  
3       trying to try a case with 25 defendants, obviously, but  
4       there's a real concern that's been expressed by a lot of  
5       people, I think, that if you start so sort of gerrymander  
6       the group of defendants, it doesn't serve much purpose for  
7       bellwether anymore. Because if you think of the idea behind  
8       a bellwether trial is you can't try 2,600 cases, we'll try a  
9       handful to get a better understanding of what would happen  
10      if we tried all 2,600, the other ones.

11              But if we try cases that don't look anything like the  
12      other 2,600 because we've gerrymandered the groups of  
13      defendants or the claims, the result of a trial that  
14      involved only three distributors or only five pharmacies or  
15      only 12 pharmacies, depending on the jurisdiction, everyone  
16      is going to look at that and say, well, that's nice, but  
17      that doesn't tell me anything about what would happen if you  
18      tried the case of Ingham County, Michigan, as they actually  
19      pled it against 25 defendants.

20              I understand you're going to say --

21                      THE COURT: The problem is when I did that,  
22      Mr. Stoffelmayr, the response from the defendants are the  
23      trial will take at least eight months. All right?

24              So it's nice in theory, but it's not in practice. So  
25      we cannot try 25 defendants, and you know that.



1 MR. STOFFELMAYR: Correct. And I think the  
2 problem here is that the cases have been over-pled against  
3 way too many defendants.

4 THE COURT: Maybe so.

5 MR. STOFFELMAYR: And that remains the case.

6 THE COURT: But the principle is you can't  
7 try -- like Summit and Cuyahoga County started at 22  
8 defendants, I believe, or families, I'll call 22 defendants  
9 with maybe 8 or 10 claims, it was unworkable, unwieldy,  
10 unmanageable. By the time we were ready for trial it was a  
11 manageable case, but again, that model of how it was done is  
12 not sustainable.

13 MR. STOFFELMAYR: But I think to answer your  
14 question you started with, does anyone see a problem with  
15 this, my problem the problem that certainly some people have  
16 expressed, and I don't pretend to speak for everybody, is  
17 that as a bellwether process it's not very interesting and  
18 not very helpful.

19 THE COURT: Well, the problem is we can't try  
20 the kind of cases that the plaintiffs have brought, so  
21 that's not an option. I mean that's what we started with in  
22 Summit and Cuyahoga County, 22 defendants and 8 or 10  
23 claims, and the defendants said the trial is going to take  
24 eight months. So I said no jury can focus for eight months,  
25 no Court has eight months.

1           So there was no disagreement on those principles, and  
2           so I hear what you're saying, but I don't see any other way  
3           to do bellwethers unless they are structured and focused.  
4           And it seems to me also that it has the advantage of  
5           simplicity, the jury can really focus on, all right, do the  
6           plaintiffs have a case against the manufacturers.

7           Here is their argument: The manufacturers  
8           aggressively marketed these pills as being safe, effective,  
9           nonaddictive, when they knew they weren't. Can they prove  
10          it, or they can't. It's a simple principle. Plaintiffs say  
11          we can prove that, defendants say you can't.

12          Well, let's see. With the distributors it is pretty  
13          simple: The distributors didn't do a good enough job in  
14          making sure the pills went only to those people who should  
15          have gotten them. Plaintiffs say we can show their  
16          suspicious order monitoring systems were ineffective, and  
17          the distributors knew it. The distributors are going to say  
18          our systems were as good as we could make them, and they  
19          complied with the law.

20          All right? Again, it's simple to say that. See what  
21          a jury says with that. Okay? So you know, I want cases  
22          that juries can understand so that no one can say, well,  
23          we're going to ignore this result because this was such a  
24          mish-mash, no one could make sense of it. That doesn't help  
25          anyone.

1 MS. MAINIGI: Your Honor --

2 THE COURT: Yes.

3 MS. MAINIGI: Excuse me. Enu Mainigi on  
4 behalf of Cardinal Health.

5 I'd like to join in the objections to the basic  
6 principles Your Honor has articulated to the extent they're  
7 inconsistent with the proposed statement or proposed plan  
8 that we have filed.

9 Let me touch on a different issue.

10 THE COURT: Let's stick with -- I don't  
11 understand, Ms. Mainigi, what you're -- everyone wrote a  
12 whole lot of different things. Okay? So if you're  
13 saying you agree with Mr. Stoffelmayr, you want to go back  
14 to 22 defendants and 10 claims.

15 MS. MAINIGI: I'd like to discuss a different  
16 principle you'd raised, Your Honor.

17 THE COURT: Well, let's stick with one. I'm a  
18 simple-minded person, I want to stick with this one. All  
19 right?

20 MS. MAINIGI: Okay. With respect to that  
21 one --

22 THE COURT: Because that's the only one I have  
23 heard objections to. No one objected to the Court ought to  
24 facilitate settlements when everyone is willing, and we  
25 should effectively utilize my resources and the special

1 masters. The only objection I'm hearing is to the second  
2 one.

3 MS. MAINIGI: Your Honor, that's incorrect. I  
4 have an objection at least on behalf of Cardinal, I think  
5 it's joined by the other distributors at the very least, to  
6 the principle of effectively utilizing the resources of the  
7 team to the extent that is inconsistent with the hub and  
8 spoke concept that has been articulated by Special Master  
9 McGovern to the parties over a period of the last six  
10 months.

11 Our position is as our papers reflect, that the cases  
12 that are under consideration at this point should be  
13 remanded to the transferor court, and ultimately leave it up  
14 to the transferor court to make a determination as to  
15 whether and what assistance may still be needed.

16 But these cases Your Honor has done a tremendous job,  
17 and Special Master Cohen has done a tremendous job of  
18 overseeing general discovery in this matter for all of the  
19 defendants. The time has come for case-specific discovery  
20 to occur, and it is our view that that ought to occur in the  
21 transferor court in the particular jurisdiction.

22 THE COURT: Well, that's not inconsistent. I  
23 didn't say that principle number three was that I was going  
24 to do everything. Obviously, I can't. I can't, I can't do  
25 everything. So I want to focus on are you objecting to if

1 cases are structured or remanded that they be focused? You  
2 want to go back to the 22 defendants and 10 causes of  
3 action?

4 MS. MAINIGI: Your Honor, I do think that that  
5 issue is an appropriate issue for the transferor judge to  
6 take up. I completely understand the concerns you are  
7 articulating in terms of the unwieldiness, but I think the  
8 proper way to deal with that is as was suggested before me,  
9 for discovery to occur in front of the transferor court, and  
10 then decisions related to any sort of severance or dropping  
11 of claims or defendants can be made.

12 THE COURT: Well, I hear what you're saying,  
13 and that is a way to do it, but I think it would be very  
14 unfair for me to ask any other judge in the country to go  
15 through what I've gone through over the past year, unless  
16 you're proposing that you want to pay for a whole raft of  
17 special masters at the same rate, maybe different ones, to  
18 do everything that my three have done and taken all that  
19 time.

20 And even then, I don't think I would ask any other  
21 judge to do that.

22 MS. MAINIGI: Your Honor, I think that the  
23 difficulty here is in part the premise that we've all been  
24 discussing separately with the special masters. The hub and  
25 spoke involved as its basic core, as its basic premise, the

1 idea that the time would come when we were having these  
2 discussions for remand back to the transferor court.

3 If there are a handful of cases spread out among a  
4 handful of judges, I actually don't think it will be  
5 unwieldy for those courts and judges to deal with those  
6 particular issues.

7 THE COURT: Do you have any idea what I've  
8 been doing the last year?

9 MS. MAINIGI: Your Honor, you have done a  
10 tremen- --

11 THE COURT: This has been unworkable,  
12 unmanageable. It was a miracle we got this case to the eve  
13 of trial.

14 MS. MAINIGI: I agree, Your Honor.

15 THE COURT: So I'm not going to roll the dice  
16 or ask anyone else to roll the dice that way. That isn't  
17 happening. Okay? You want that? You know, it isn't going  
18 to happen. I hear your objection, it's overruled.

19 MS. McCLURE: Your Honor, Shannon McClure. On  
20 behalf of my client AmerisourceBergen, I join in the other  
21 objections.

22 THE COURT: Fine. You want to join? That's  
23 overruled, too.

24 MS. McCLURE: Okay, fine. Your Honor --

25 THE COURT: This is going nowhere fast.

1 MS. McCLURE: Your Honor, I also object to the  
2 fact that --

3 THE COURT: Object to what you want, file it  
4 in writing.

5 MS. McCLURE: Your Honor, you've requested  
6 objections. Would you like me to articulate the objections?

7 THE COURT: All right.

8 MS. McCLURE: Thank you, Your Honor.

9 To the extent you've articulated that silence is a  
10 non-objection, we object to that point. You've laid out  
11 three principles for the first time today in court.  
12 Obviously none of us have had the opportunity to discuss  
13 them with our clients.

14 Second of all, to the extent that trying a case in  
15 approximately a month is a realistic goal, given the  
16 complexity even of the claims if you reduce them to one or  
17 two and have plaintiffs dismiss with prejudice the other  
18 ones, may be unrealistic.

19 Third of all, to the extent that RICO claims are tried  
20 which involve conspiracies that are alleged among groups of  
21 defendants, that cross-groups of defendants, trying those  
22 separately is obviously prejudicial and not workable.

23 And fifth, I think that I would like the record to  
24 reflect that objections articulated for one are taken for  
25 the purposes of this to be objections for all so that we

1 don't have to sit here and memorialize our joinder.

2 MR. WEINBERGER: Your Honor, on behalf of the  
3 plaintiffs, can we address a couple of these comments?

4 THE COURT: Sure. This is going nowhere fast.  
5 I'll just have to come up with it all myself. I'm sorry I  
6 brought everyone in here, but go ahead.

7 MR. WEINBERGER: I harken back to a couple of  
8 hearings before that we had before we proceeded to trial and  
9 settled that case, and that is that I was skeptical of the  
10 possibility of both sides coming to some agreement as to how  
11 we would handle remands and this hub and spoke concept, and  
12 I guess I predicted correctly.

13 But having said that, you can take by our silence our  
14 agreement with the principles that you've articulated, and I  
15 would suggest to the Court that what you're hearing from the  
16 other side is not really in a way of trying to efficiently  
17 and expeditiously handle these cases as you are required to  
18 do as a result of the referral from the JPML panel, but  
19 rather to take advantage, take whatever advantage they can  
20 in delaying this litigation.

21 And the fact that we got to a trial -- settled at 1:30  
22 in the morning on the Monday before trial -- in about 20  
23 short months, despite the fact that we disagreed on just  
24 about everything is a tribute to you as the transferee  
25 court, and the people that you had working with you, to get



1 us to that point.

2 So the fact is that our recommendation, our position  
3 paper, is 90 percent squarely with where you are, Your  
4 Honor, in terms of how the Court should manage this case  
5 going forward. And I think it's in accord with the  
6 principles that you have suggested, and we would ask that  
7 the Court consider our position seriously as you decide how  
8 to go forward.

9 THE COURT: Thank you. I'm considering  
10 everyone's position seriously. I think I'm not going to  
11 adopt the plaintiffs', I'm not going to adopt the  
12 defendants'. I'm thinking that certain things from each  
13 position has merit.

14 It is pretty clear whatever I am going to do, people  
15 are going to object, appeal, mandamus. They can do whatever  
16 they want. I think what I'll probably just do is issue an  
17 order, and move it.

18 MR. LYNCH: Judge, Mark Lynch from McKesson.

19 If I could add one more principle to your list, and I  
20 associate myself with all of the other remarks of defense  
21 counsel here, but one more principle is these cases very  
22 sorely need some appellate rulings. And we would -- I would  
23 suggest that you consider a 1292(b) certification of the  
24 decisions on the motions to dismiss. Those are still alive  
25 with respect to the severed and non-settling parties, even

1       though three or four parties did settle.

2               And some appellate clarity on these issues would be of  
3       enormous value moving this entire -- this whole  
4       constellation of cases forward.

5               One other thing --

6                       THE COURT: Or it might bring it all to a  
7       screeching halt. So I understand that position.

8                       MR. LYNCH: Another thing I'd just like to  
9       point out is you did valiant work in getting this case to  
10      the eve of trial, there's been an enormous amount of  
11      discovery of the defendants which essentially, I think,  
12      takes care of all of the discovery at a generic corporate  
13      level.

14               There may be a little bit of discovery that's  
15      necessary when cases go back to a particular transferor  
16      court, and you and the special masters get great credit for  
17      that, but the remaining discovery is very geographic  
18      specific. It's going to relate to whatever the defendants  
19      did in Huntington, West Virginia, or Chicago. And it's also  
20      going to relate to how the localities, how those  
21      communities, how those governmental entities reacted.

22               So this is a situation where I think the transferor  
23      courts are in a very good position to guide the discovery,  
24      rather than you and a special master located in Cleveland  
25      trying to figure out how the opioid crisis played out in

1 Chicago or Cabell County.

2 This is not typical of most MDLs where you have such  
3 case-specific geographic discovery that needs to be done.  
4 And while I don't disagree with you that there probably  
5 aren't very many judges that are going to welcome having  
6 these cases back on their dockets, I think really at the end  
7 of the day it's the transferor judge who is going to be in  
8 the best position to shape and guide the case, both in terms  
9 of discovery and also in terms of dispositive motions, which  
10 are going to involve the application of a state law that's  
11 different than the law that you've already addressed under  
12 Ohio.

13 So I would add those thoughts and those principles to  
14 your list of considerations, with all respect.

15 THE COURT: I appreciate that, and I think I  
16 generally share that, and I wasn't contemplating that if I  
17 remanded a case I would manage the discovery and do the  
18 motions. But I don't think it's fair or appropriate, nor  
19 would it be productive to send a case to West Virginia or  
20 Chicago or California, or whatever, with 22 or 25 defendants  
21 and 10 causes of action.

22 That judge won't have a clue what to do and will spend  
23 all of his or her time doing what I did. All right? I  
24 mean, I would not ask one of my colleagues to do that, and I  
25 just don't think that you're going to get a good result.

1                   MR. LYNCH: I understand that, Your Honor. In  
2                   that regard, I think you hit the nail absolutely squarely on  
3                   the head earlier in your comments, where you said the cases  
4                   that the plaintiffs have pled can't be tried. That's not  
5                   our fault, that's with the plaintiffs.

6                   THE COURT: Well, I can say this is the kind  
7                   of case I'm going to send, you know, I'm inclined to send to  
8                   West Virginia or Chicago, and if you're willing to  
9                   streamline your case to that you've got it. If not, I may  
10                  not do it.

11                  MS. MAINIGI: Your Honor, may I add one more  
12                  point to the mix? I apologize.

13                  THE COURT: All right.

14                  MS. MAINIGI: With respect to the location of  
15                  the cases, Your Honor, as an Ohio corporation, I do think  
16                  that one of the points I need to make, and I think this is  
17                  shared, is that if we are really going to move this MDL  
18                  along, if these next set of cases are really going to serve  
19                  as bellwethers or representative cases that can advance  
20                  resolution here ultimately, get us closer to settlement,  
21                  none of the cases that get remanded or get put up for  
22                  discovery should be from Ohio.

23                  Ohio has been litigated, the case law has been  
24                  decided. We don't think it would be appropriate to have any  
25                  more cases from Ohio in the next set of cases that go

1 through discovery.

2 Now, for some of the jurisdictions there's very  
3 specific reasons. For the city of Cleveland, as everyone  
4 recalls, there were great discovery abuses that occurred  
5 that led to the city of Cleveland no longer being in the mix  
6 and put behind Track 2 with respect to moving forward.

7 But the general principle that the MDL, if it's going  
8 to be successful, ought to be taking into account law from  
9 other jurisdictions so that there is ultimately movement in  
10 the entire MDL I think rings true.

11 I think that there's also a concern that if it is Ohio  
12 again that is in the mix or is one of the cases in the mix,  
13 we've got a concern that particular counties, cities, are  
14 really going to reap the benefits that come early with a  
15 bellwether that is not being shared by other jurisdictions  
16 all over the country.

17 So I did want to note that principle as one that  
18 underscores our proposal.

19 MR. LYNCH: And as a non-Ohio-based  
20 corporation, we would agree with that as well.

21 THE COURT: I've been giving that a lot of  
22 thought. On the other hand, a great deal of work was done  
23 to gear up for this trial. I also have Track 1B. All  
24 right. There needs to be a pharmacy case, and in my view  
25 pharmacies as dispensers. That was specifically not

1 developed here. It needs to be developed, and there has to  
2 be a trial worked up on that.

3 So the question is which case should that be, and I've  
4 got some ideas.

5 MR. STOFFELMAYR: Your Honor, could I address  
6 that? Because I think that's probably uniquely important to  
7 us, of course.

8 You know, I completely agree that that is a theory of  
9 liability that has not been worked up, and that will be an  
10 enormous project to work that up. It is a completely  
11 different theory of liability involving obviously different  
12 facilities, different witnesses, different regulatory  
13 regime, both at the state level and the federal level. In  
14 many ways a much bigger case and much more complicated case  
15 because it is a more granular theory of liability than what  
16 we saw on the distribution side.

17 There are a lot of cases that have pled that theory of  
18 liability. As you know, it has not been pled so far in the  
19 Track 1 complaints. There's a motion to amend pending. It  
20 has been pled in the Track 2 complaints and, rough numbers,  
21 I want to say half the cases in the MDL, not all; but maybe  
22 it is more than half. I don't want to promise I've got the  
23 ratio right.

24 So there are plenty of opportunities to do that that  
25 are consistent with, I think, some of the thoughts I think

1       you heard articulated, that it would be useful to the  
2       parties to explore cases under different legal standards,  
3       not just to revisit Ohio law.

4               But the other thing that I think is really important,  
5       thinking about Track 1 specifically, and this probably would  
6       include Cleveland and Akron, is that my experience and I  
7       think most people's experience with how a bellwether process  
8       is really useful, is getting a verdict is in some senses the  
9       least important part of the process.

10              It can be important, obviously, but what a lot of  
11       people would say, and I have certainly heard MDL judges say,  
12       is forcing the parties to work a case up and get it ready  
13       for trial is what is truly educational in forcing parties to  
14       learn their case, really think about what is the expert  
15       actually going to say about this, not just hypothetically  
16       what I think an expert could say. What does this case  
17       really look like.

18              And from that perspective, whether we're talking about  
19       a pharmacy case or a distribution case or a manufacturer  
20       case, we already know probably most of what there is to know  
21       about the case brought by Cuyahoga and Summit Counties. We  
22       know nothing about what a case looks like if it's brought by  
23       a large coastal city. We know nothing about what one of  
24       these cases would look like brought by a rural community.  
25       We know nothing about what one of these cases would look

1       like brought by an Indian tribe.

2               And all of these are going to look very different in  
3       important ways. From one perspective you could say, well,  
4       the liability theory is the same no matter what. The way  
5       the opioids crisis has affected communities varies  
6       enormously, the way prescription pills rather than illicit  
7       heroin plays into that crisis varies enormously by  
8       community. And perhaps most importantly, what communities  
9       have done to respond to the crisis, the kinds of services  
10      they have provided and want to provide varies enormously.

11              So if we think of the bellwether process as an  
12      educational process for the parties not just to get the  
13      verdicts, but to learn cases and learn about cases, very  
14      little is gained by redoing the same case over and over  
15      again, and a lot could be gained with no real loss in time  
16      by moving to other cases in other jurisdictions.

17              MR. WEINBERGER: Your Honor, specifically to  
18      address Mr. Stoffelmayr's comments, he must have read our  
19      position paper, because our position as to how the cases  
20      should proceed and which ones should be remanded does  
21      exactly what it is that Mr. Stoffelmayr is suggesting in  
22      terms of it exposing this litigation to a whole wide variety  
23      of different plaintiffs and different causes of action.

24              As to the claim that our adding dispensing claims  
25      somehow will create this complex long litigation, our



1 complaints have always included factual allegations  
2 regarding dispensing conduct. And the amended complaint  
3 that we have filed gives more clarity to how it is the  
4 dispensing claims should proceed.

5 And we are prepared to put together a discovery plan  
6 with respect to those dispensing claims that I think will  
7 demonstrate that we can -- we don't have to spend years  
8 working up that case, that it very much what has been worked  
9 up includes factual facts and discovery that will apply to  
10 the dispensing claims.

11 And then finally, with respect to the comment about  
12 the city Cleveland and its alleged abuse of discovery, I  
13 can't leave that comment unaddressed.

14 In this litigation, city of Cleveland has produced  
15 almost 700,000 documents, 5.5 million pages of documents.  
16 And we continued on behalf of the city of Cleveland to  
17 produce discovery even after Cleveland was severed from this  
18 case, so much so, Your Honor, that eight of the city of  
19 Cleveland witnesses who were deposed by the defendants were  
20 on the defendants' witness list for purposes of this trial.

21 So to suggest that Cleveland and Akron should not go  
22 forward as a bellwether based upon this allegation with  
23 respect to the city of Cleveland just does not hold true.

24 THE COURT: Well, to be fair, I don't want to  
25 have a long discussion of this, but there were some very

1 significant problems in discovery that led to Akron and  
2 Cleveland being severed out, and that's a fact. That's why  
3 we had to do it.

4 So no one is disputing that the city of Cleveland and  
5 the city of Akron produced a large number of documents and  
6 there were a large number of witnesses being deposed, but  
7 there was a problem with the timeliness.

8 MR. WEINBERGER: Much of which, Your Honor,  
9 was rectified subsequent to the severance.

10 THE COURT: I guess I wasn't tracking it then.

11 MS. WU: Your Honor, this is Laura Wu from  
12 McKesson. If I could speak very briefly to the Cleveland  
13 issue.

14 As you may recall, Cleveland was seriously far behind  
15 in discovery, threatening the schedule that you had put in  
16 place for the bellwether trial. The defendants were  
17 prepared to seek relief, specifically including the  
18 dismissal of Cleveland's claims based on the egregious  
19 conduct that went forward over a period of months in  
20 discovery, specifically including Cleveland's repeated  
21 denial of the failings defendants had worked very hard to  
22 uncover.

23 Defendants were prepared to move and, counseled by the  
24 special masters, held off to allow Your Honor to have a  
25 solution to allow the bellwether trial to go forward.

1           As you will also recall, you ruled that Cleveland was  
2 essentially put in the penalty box for its conduct,  
3 Cleveland could not go forward for trial until after Track  
4 2, and there's no reason to change your prior rulings.

5                     THE COURT: Well --

6                     MR. PIFKO: Your Honor, Mark Pifko from Baron  
7 & Budd, on behalf of Cleveland. I would like to address  
8 some of the comments that have many made.

9           First, it cannot be disputed, setting a trial date as  
10 soon as possible would further the interests of resolving  
11 this case.

12           As you know, on October 18th we had the first global  
13 mediation with the distributors, and what drove that October  
14 21st trial date. Cleveland and Akron are undoubtedly, even  
15 if there were issues, the next plaintiffs that are ready to  
16 be tried in this litigation.

17           Now, Cleveland was a little delayed, but we've  
18 completed our production. We had an independent consultant  
19 verify the collection. That was completed in February. And  
20 the document production was completed in March.

21           And as Mr. Weinberger said, many of Cleveland's  
22 witnesses were on the trial list. About ten percent of the  
23 defendants' document exhibits in the trial were from  
24 Cleveland. So the notion that Cleveland wasn't ready or  
25 should be punished is false.

1           And I also want to add that when the severance order  
2           was issued there was the notion -- that was entered in  
3           February of this year, there was the notion that we were  
4           going to set and start discovery in CT-2 and that we were  
5           going to actually have a CT-1 trial, and neither of those  
6           things have happened to date.

7           So the reason -- if we were going to have a CT-2  
8           trial, we had started discovery back then, then sure it  
9           might make sense -- we might be having that trial now, and  
10          it might make sense to have Cleveland after that. But we  
11          never had that trial, and there hasn't been any discovery  
12          produced in CT-2, so the reason for that sentence just  
13          doesn't hold water anymore.

14          And again, I think it would be in the best interests  
15          of the entire litigation to move forward with the  
16          distributor case trial by Cleveland and Akron, who are  
17          completely ready to go.

18                       MS. WU: Your Honor, Laura Wu from  
19          McKesson --

20                       THE COURT: I don't want to do a lot of back  
21          and -- there were problems with Cleveland, everyone knows  
22          that. That's why Cleveland was severed out. So I don't  
23          really need to revisit. I know the history. I'd rather not  
24          have more of a public airing on that.

25                       All right. Look, I believe that what should be done

1 is there should be a focused trial against the big three  
2 distributors, a focused trial against the manufacturers, and  
3 a focused trial against the pharmacies as whatever the  
4 pharmacies do. Some of them distribute, all of them  
5 dispense; whatever, the pharmacies.

6 And I think there should be only one or two causes of  
7 action. There's public nuisance. I'm not sure if you need  
8 conspiracy. I don't know conspiracy, to do what. But in my  
9 view, it's public nuisance is the main one.

10 I don't really care where those are tried. They  
11 should be representative. The parties seem to agree  
12 that -- Track 2 is Huntington and Cabell County, so that's a  
13 logical place to have one of them. All right? I don't think  
14 it matters which one. All right?

15 Chicago, everyone is talking about Chicago. That's  
16 been worked up, there have been motions. You know, there  
17 are apparently local ordinance causes of action, that makes  
18 that simple and streamlined. That's a logical one.

19 Plaintiffs suggested California. I think it makes  
20 sense that San Francisco County and state, I think it makes  
21 sense to have one on the west coast. Again, it should  
22 be -- I don't care who it is.

23 And then I want to have one tribe case, and it seems  
24 to me rather than doing that I would logically go with the  
25 Cherokee Nation. It's far and away the largest tribe. If

1 we're going to do one, I don't think it should be a real  
2 small one. We might as well do a large one that probably  
3 covers -- that's a logical one to do.

4 So that's four cases. Now, potentially there could be  
5 one case in -- I could do one. All right? Potentially I  
6 could do -- Track 1B could be the pharmacy case, because we  
7 severed all the pharmacies. They were all severed early,  
8 and then Walgreens was severed at the end, when the  
9 distributors all settled. So potentially I could do that.  
10 I don't have to, but I'm not trying to just export all the  
11 trials, but that's one I could do.

12 It's logically still there. It could be Summit and  
13 Cuyahoga County against the pharmacies, and I'm willing to  
14 do that. It seems to me that -- I was thinking of a four or  
15 five-week trial, and the plaintiffs were suggesting it could  
16 be done in the spring. I don't think that's realistic. I  
17 think it would be -- I was thinking of roughly a year, like  
18 next October, because I was looking at the kind of schedule  
19 we had. It seems to me that would be doable, but again, I  
20 don't have to do it.

21 But if we're going to do that there wouldn't be any  
22 more severances. These would be the cases. There wouldn't  
23 be a West Virginia Track 1-BC, there would be a West  
24 Virginia case. It would be just say hypothetical against  
25 the big three distributors, and one or two causes of action,

1 and that would be it. The other causes of action would be  
2 dismissed and so would the other defendants, and that's what  
3 would go forward, and that judge would manage it.

4 We do one in Chicago. I mean, the plaintiffs have  
5 suggested manufacturers only Chicago. Distributors, big  
6 three distributors only in West Virginia. That's fine.

7 They suggested California, I think we might as well  
8 have one there. I don't know who the defendants are. I do  
9 not suggest sending to a California colleague 25 defendants  
10 and 10 causes of action.

11 And then we need a pharmacy case. If that's the one  
12 to go to California, if the parties want to send it to  
13 California, fine. As I said, I think we need -- and then we  
14 have a tribe case, and I guess the tribes are sort of -- I  
15 haven't figured out which defendants and which causes of  
16 action fit for the Cherokee case. The parties can figure  
17 that out.

18 So that's sort of where I'm coming from.

19 MS. MAINIGI: Your Honor, if I may. I think  
20 it's extremely valuable to get your thoughts on these issues  
21 because we haven't had the benefit of them yet. One  
22 suggestion and one comment.

23 The suggestion that I have is there was not much  
24 opportunity to really meet and confer prior to today about  
25 our respective proposals, just given the timing of when

1 people sent them in, and there just wasn't a lot of  
2 communication about it last week.

3 I would suggest with the benefit of having seen each  
4 other's proposals, as well as the guidance Your Honor has  
5 provided, that perhaps we take some more time, just a short  
6 amount, to see if we collectively can present a plan to you  
7 that has the sign-off of both the defendants as well as the  
8 PEC, just as a way to present Your Honor with something that  
9 incorporates your ideas as well as incorporates the major  
10 elements that each side cares about.

11 I think that that certainly would be possible given  
12 some of the comments that you have made, and so I would  
13 suggest we take the time to do it.

14 One minor note that I'll just make for the record,  
15 with respect to the Cherokee Nation case that you mentioned,  
16 I do think that that is an extremely complex case that could  
17 bog down. A lot of discovery in that --

18 THE COURT: Then maybe it needs to be -- I'm  
19 suggesting that be streamlined, too. I don't want to send  
20 to my colleague in Oklahoma 25 defendants and 10 causes of  
21 action. I mean, as I said, I'm not -- look. Any of my  
22 colleagues could do what I did. I'm not saying they  
23 couldn't do it. I think it would be unfair and  
24 counterproductive.

25 It seems to me that that's something for me to do in



1 conjunction with the parties, is send a case which we all  
2 know can be tried -- okay? Not an "if" -- rather than  
3 sending one which we know can't be tried. Why would we do  
4 that. I mean, it just doesn't make sense. If we all know  
5 the case can't be tried, why send it, and say, Judge, we  
6 know you can't try this case, it's up to you to figure it  
7 out. Do what Polster did over the course of a year.

8 MS. MAINIGI: Your Honor, with respect to  
9 Cherokee Nation, it's the difficulty is really the opposite  
10 to some extent, in that the discovery for any one defendant  
11 even of Cherokee Nation would involve discovery of 14  
12 different counties in Oklahoma, 50 different law enforcement  
13 agencies in Oklahoma.

14 So the plaintiffs' side, the discovery defendants need  
15 to do of the plaintiffs' side is quite complex and would  
16 take a tremendous amount of time.

17 But I hear what Your Honor is saying --

18 THE COURT: Well, I hadn't focused on that,  
19 and that's a good point.

20 MS. MAINIGI: And I requested that you give us  
21 time to continue to meet and confer on this, and perhaps  
22 present a unified plan.

23 MR. SOLOW: Your Honor, Andrew Solow for the  
24 manufacturers --

25 THE COURT: Let me -- it's the Cherokee

1 Nation, the people reside in that, but they don't -- you are  
2 not going to be doing discovery of counties, would you?

3 MS. MAINIGI: Well, with respect to costs,  
4 Your Honor, for example, and causation type of issues, as  
5 well, those would involve the 14 counties and 50 different  
6 law enforcement agencies.

7 THE COURT: Well, the entities, the Cherokee  
8 Nation is bringing the case and seeking damage on its own  
9 behalf. So any expenses, whatever, it comes from the  
10 Cherokee Nation. It wouldn't be through any county or  
11 county facilities. It would be here is what the Cherokee  
12 Nation claims that they've spent addressing the opioid  
13 crisis for its members.

14 MS. MAINIGI: But --

15 THE COURT: They provide healthcare and  
16 services.

17 MS. MAINIGI: But the Cherokee Nation has also  
18 received assistance from those 14 counties and law  
19 enforcement, so they would certainly be a basis for  
20 discovery. I'm not saying they would be parties, Your  
21 Honor, obviously these counties and law enforcement  
22 agencies. My point is simply, and I didn't mean to get us  
23 bogged down on this, but --

24 THE COURT: Look. I picked them because  
25 they're the largest.

1 MS. MAINIGI: They're the largest, and  
2 unfortunately they're the most complex.

3 The other complication, Your Honor, with the Cherokee  
4 Nation is we already have a ruling in Oklahoma. So to the  
5 extent that we are trying to explore the laws of other  
6 jurisdictions in an effort to cut a wide swath here on  
7 rulings on case-specific workup related to other  
8 jurisdictions to help bring about resolution, I'm not sure a  
9 case in Oklahoma, where there's already been  
10 substantial -- there's been a substantial ruling and  
11 abatement money going back to the state of Oklahoma, which  
12 will benefit the Cherokee Nation.

13 THE COURT: Was there a settlement in Oklahoma  
14 for abatement money?

15 MS. MS. MAINIGI: There was a judgment in  
16 Oklahoma, in the Oklahoma case, Your Honor, and two  
17 settlements, Your Honor.

18 THE COURT: Oh, right.

19 MR. OHLEMEYER: Your Honor, if I may.

20 THE COURT: Yes.

21 MR. OHLEMEYER: Bill Ohlemeyer for the  
22 Cherokee Nation.

23 With respect, I disagree with most of that. It's not  
24 as complicated as that. It is a claim, as you have said,  
25 brought on behalf of the Cherokee Nation which provides for

1 its members healthcare, law enforcement, social services.  
2 It is as if it were a self-contained, as it is, sovereign  
3 unit within the state of Oklahoma.

4 It doesn't require discovery of 50 different -- or 12  
5 different counties or 50 different agencies. It's a case  
6 brought by a sovereign, just as if the state of Oklahoma had  
7 brought a case on its behalf, which it did.

8 It's a relatively simple case. There's only six  
9 defendants in the case.

10 THE COURT: Who are the defendants?

11 MR. OHLEMEYER: The defendants are McKesson,  
12 AmerisourceBergen, Cardinal; then Walmart, CVS, and  
13 Walgreens, each of which is also a wholesaler as well as a  
14 retail dispensary.

15 MS. MAINIGI: Your Honor, with respect to a  
16 representative tribal case, the parties seem to be in  
17 agreement that the Fond Du Lac case, which is in a brand new  
18 jurisdiction, would be an appropriate case to work up. I  
19 don't think we need two tribal cases worked up, and I think  
20 Fond Du Lac would have much greater, wider applicability and  
21 could be done much more quickly.

22 MR. SOLOW: Your Honor, we also believe  
23 whatever the tribal case selected, it should remain in  
24 federal court. That is something that the manufacturers and  
25 defendants put into our proposal.

1                   THE COURT: I wasn't suggesting it go to state  
2 court.

3                   MR. SOLOW: Well, Your Honor, there could be  
4 an issue of a motion for remand back to state court, so we  
5 think it should be a condition that whatever the tribal case  
6 is --

7                   THE COURT: Well, that's for sure. I'm not  
8 remanding a case to federal court that's going to go to  
9 state court. I don't think anyone is contemplating that.

10                  MR. SOLOW: Great, Your Honor.

11                  Next point on the city of Chicago, or otherwise known  
12 as Chicago 1, the manufacturer case, it looks like the  
13 parties are in agreement about that case as the manufacturer  
14 case.

15                  Your Honor, however, it strikes us as an odd request  
16 from the plaintiffs that is not aligned with Your Honor's  
17 principles, particularly the third one, that a case where  
18 rulings have already been made by the district judge and  
19 discovery rulings have already been made by the magistrate  
20 court for Your Honor to then hold on to the case, decide  
21 issues of amendments and discovery, and then send it back  
22 for dispositive motions.

23                  Our view is that case in an effectively use of your  
24 resources would be remanded right now to that judge and that  
25 magistrate who already have experience. It simply doesn't

1 make sense, Your Honor, for you to be now making rulings  
2 after another judge, and then when it's already contemplated  
3 in both sides' parties that the trial judge will be making  
4 additional rulings.

5 THE COURT: Well, if a case is remanded to  
6 Chicago, the judge in Chicago will be handling the case.

7 MR. SOLOW: That's our view, it should be  
8 remanded now. The PEC's proposal is that first there should  
9 be additional discovery and motion practice here before  
10 remand.

11 THE COURT: Well, my basic thought is that if  
12 I remand the case I remand the case, and that judge handles  
13 it the way he or she sees fit. If they want some help they  
14 can ask for help, but it's that judge's call.

15 The only issue would be what to do if they were  
16 fully-briefed motions that exist now, whether I should  
17 decide them or that judge should, and there are probably  
18 good arguments either way.

19 But I wasn't proposing that I would remand the case to  
20 a judge in Illinois or California and I would somehow be  
21 doing it.

22 MR. SOLOW: No, Your Honor, not to suggest you  
23 would be doing anything after remand. Our point is that the  
24 remand should happen immediately. Nothing further needs to  
25 be done now. Any remaining motion practice or discovery can

1 be done after remand.

2 THE COURT: Right, but the issue is what if  
3 there is a fully-ripe motion right now.

4 MR. SOLOW: Candidly, Your Honor, it doesn't  
5 make sense under your principle three for you or your  
6 special masters to do it when there is a federal judge who  
7 has already ruled on motion practice in that case and a  
8 magistrate that's already made discovery rulings. They're  
9 well familiar with the case --

10 THE COURT: You are talking about the Fond Du  
11 Lac case.

12 MR. SOLOW: -- and could adjust easily --

13 THE COURT: It is my understanding that the  
14 only defendant in that case is Mallinckrodt, and that  
15 doesn't make sense to send a case with only one defendant.

16 MS. MAINIGI: We're double-checking, Your  
17 Honor, but I don't think that's correct. There's two Fond  
18 Du Lac cases, I think.

19 MS. SINGER: Your Honor, this is Linda Singer  
20 with the PEC.

21 While they are checking on the Fond Du Lac case, just  
22 to speak to the city of Chicago issue, there are  
23 fully-briefed motions pending before Your Honor. And the  
24 reason that we have suggested that you handle certain  
25 discrete issues is because they are issues that you have

1 previously considered and ruled on, and that are no  
2 different for the city of Chicago. For instance, the  
3 manufacturers' responsibility for their distribution of  
4 controlled substances.

5 The Mallinckrodt case was not before the city of  
6 Chicago court when it was transferred here. That's an issue  
7 Your Honor knows well.

8 And again, consistent with your principles of using  
9 your resources and leveraging the knowledge you have  
10 developed over this case and the rulings you have made, and  
11 moving cases quickly and efficiently to remand courts, it  
12 seems to make sense for those discrete issues to be decided  
13 by Your Honor so the case goes back to a federal district  
14 court --

15 THE COURT: That may make sense. If I have  
16 ruled on the same argument, then it probably makes sense for  
17 me to rule on at least that motion or that portion of it,  
18 because for consistency.

19 MR. SOLOW: Respectfully, Your Honor, we  
20 disagree.

21 THE COURT: That's ultimately for me to  
22 decide. I can do it either way. The law permits either  
23 one, and I can do it. I'll figure that out.

24 Again, I'm not going to -- a tribe case with only one  
25 or two defendants would not be a good case to remand.



1 MS. MAINIGI: The Minnesota Fond Du Lac case  
2 does have multiple defendants, Your Honor, but I come back  
3 to the idea that this is too important for us to kind of  
4 decide on the fly.

5 THE COURT: I'm just saying as a matter of  
6 principle, I'm not going to remand any case --

7 MS. MAINIGI: I understand.

8 THE COURT: If West Virginia only had one or  
9 two defendants, I wouldn't be considering it.

10 MS. MS. MAINIGI: But I do think it would be  
11 valuable, Your Honor, for us to get a little bit more time  
12 to see if we can reach agreement on some of these issues,  
13 with your guidance.

14 MR. DELINSKY: Your Honor, Eric Delinsky on  
15 behalf of CVS.

16 I would just like to second Miss Mainigi's motion for  
17 the opportunity now to a take breath after having heard your  
18 thoughts and to have a meaningful meet and confer with  
19 plaintiffs. I think we now understand what your vision for  
20 this is, at least I for one, I didn't before, and I do now,  
21 and I think that is a logical next step. And then set a  
22 time to report back to you in one form or another.

23 MR. RICE: Your Honor, Joe Rice on behalf of  
24 the PEC.

25 If Your Honor is going to delay this any further, put

1 a strict deadline, a strict timeline on it. Because we've  
2 had three or four calls with Professor McGovern on the  
3 remand process, and people always said we need 30 days to do  
4 this or 45 days to do this.

5 That is not needed here. If they want to take a  
6 couple of days --

7 THE COURT: This is what I am going to do.  
8 I'm going to give the parties a week from today, noon on  
9 next Wednesday. Today is the -- that's the 13th. Noon on  
10 Wednesday, November the 13th.

11 And what I want, I want a distributor case, I want a  
12 manufacturer case, I want a pharmacy case, and I want a  
13 tribe, Native American tribe. All right? And I want you to  
14 agree on those four cases and where they should be, which  
15 ones they are.

16 If you all can't agree I'll pick one, and I'll make  
17 it. Okay? And I will dismiss claims. If you all can't  
18 agree, I'll do it myself. And you want to all appeal to the  
19 Supreme Court, be my guest.

20 But the cases will be streamlined and they'll be  
21 focused, so any judge who gets that case will know how to  
22 try it. And once we do that, I'll figure out if there are  
23 dispositive motions fully briefed in any of those cases,  
24 whether I should decide them.

25 You can give me your opinion on that. Again, that's

1 my call to make.

2 MR. SHKOLNIK: Judge Polster, Hunter Shkolnik  
3 on behalf of Cuyahoga County.

4 THE COURT: Yes.

5 MR. SHKOLNIK: With respect to the potential  
6 four cases, would that also include the potential CT-1B,  
7 which is fully worked up here, or --

8 THE COURT: As I said, any of these cases  
9 could be -- well, the only one, the only one that could be,  
10 Summit and Cuyahoga would be the pharmacy. Obviously it  
11 can't be the manufacturers, it can't be distributors, and it  
12 can't be the Native American tribe, Mr. Shkolnik.

13 So potentially number three could be -- I mean, I  
14 threw it out as a possibility. It's there, the case exists  
15 now. It's actually on my docket. That's essentially 1B  
16 with some streamlining. So that could be one. I'm not  
17 saying it has to be, but it could be, it could be 1B. And  
18 I'm obviously willing to do it.

19 The point of this, as I say, everyone knows an MDL  
20 Judge can only try cases in his or her district absent full  
21 consent, so I could do the pharmacy case.

22 So the idea would be these would be streamlined, it  
23 would be only those defendants and those causes of actions,  
24 and other defendants and causes of actions would be dropped,  
25 and those cases would be tried.

1           And I'm confident that I could identify with the MDL  
2 panel's help three or four judges in other jurisdictions to  
3 expeditiously try these cases. And I think it would be -- I  
4 know I can do it if they're streamlined and focused, because  
5 I can find colleagues in conjunction with the JPML to do it.  
6 And they would understand that the trial would need to be  
7 expeditious, obviously giving fair time for discovery, but  
8 expeditious. That's the whole point.

9           So hopefully you can use this discussion and what the  
10 Court has said to come up with this. If the parties fail  
11 to -- can't come to agreement, you know, I guess give me  
12 your competing proposals, and in very short order I will  
13 issue an order, and that will be -- obviously it will be  
14 suggestion, because any remand, I can't remand -- as  
15 everyone knows, I cannot remand a case on my own.

16           I can make a suggestion of remand to the panel. I  
17 would think they'll agree to it, but I only have authority  
18 to make a suggestion.

19           MS. MAINIGI: Your Honor, thank you for the  
20 additional time. I think that will be helpful, and we will  
21 work diligently during that time.

22           THE COURT: I have the best lawyers in the  
23 country, and I believe that you can do this. I'll be very  
24 disappointed if I just get a proposal from the  
25 manufacturers, a proposal from the distributors, a proposal

1 from pharmacies, and a proposal from the plaintiffs. If I  
2 do, you know, I'll just come up in very short order with my  
3 own, and that will be that, but I believe you can do this.

4 And again, I want you to really spend some time on the  
5 Native American tribe cases. It is very important that we  
6 have one, but it's got to be doable, and it should be not  
7 atypical. Okay?

8 Obviously each Native American tribe is separate.  
9 Some are large, some are small. Some are in a very large  
10 geographic area, some are probably just in one county. But  
11 since we're only going to have one, I want it to be a -- I  
12 don't want people to say, well, this is totally  
13 idiosyncratic and it is a very bad case to pick.

14 So we can work on that.

15 MR. LAMB: Your Honor, Archie Lamb on behalf  
16 of the Tribal Leadership Committee.

17 We've got a really hard-working committee. We have  
18 presented the papers outlining the Cherokee as the most  
19 likely remand.

20 Your concern -- our concern is relative to the  
21 abatement of the smaller tribes. We have an agreement  
22 internally to include the abatement should you choose to  
23 send it back to Oklahoma.

24 THE COURT: I didn't quite follow that.

25 MR. LAMB: What I'm saying is we have an

1       agreement to make sure that the abatement model covers all  
2       tribes, even if it's the Cherokee tribe. The abatement  
3       model is the most important for the remote tribes.

4               What we're saying, what I'm saying is the position we  
5       presented is the position that we're going to maintain. And  
6       I don't want you to be thinking that there are other issues  
7       relative to prosecuting the Cherokee case.

8               THE COURT: Clearly one of the theories are  
9       going to be public nuisance, and the Court has already ruled  
10      that public nuisance -- well, I only did it for Ohio. I  
11      don't know what the law is in Oklahoma.

12              In Ohio I ruled that public nuisance liability is for  
13      the jury. If the jury finds liability, remedy is for the  
14      Court in a subsequent proceeding.

15              And if, say hypothetically, Mr. Lamb, the Cherokee  
16      case is picked, if that's the way Oklahoma law works, then  
17      the jury would decide public nuisance liability. If the  
18      jury determines that there is public nuisance liability  
19      against one or more defendants --

20              MR. LAMB: Remember, Your Honor, Muscogee  
21      Creek has survived motions to dismiss on Oklahoma law in  
22      this court. Those decisions have already been made.

23              THE COURT: I'm just saying if Cherokee is  
24      tried and the jury finds public nuisance liability, then  
25      that would be for the judge to determine public nuisance

1       abatement for the Cherokee tribe --

2                   MR. LAMB:   Correct.

3                   THE COURT:   -- not for the whole country or  
4       all the other tribes.

5                   MR. LAMB:   But I think the metrics of that  
6       abatement model is what would apply universally.   That's our  
7       point.

8                   THE COURT:   I would hope it might, but again,  
9       that would simply be by agreement.   The judge would just  
10      focus on abatement for the Cherokee Nation and make the  
11      decision.

12                  MR. LAMB:   All right.   Thank you, Your Honor.

13                  THE COURT:   All right.   Is there anything  
14      anyone else wants to comment on?

15                  So hopefully it's just one submission.   File it by  
16      noon next Wednesday, and then the Court will very promptly  
17      issue the appropriate order or orders.

18                  MS. MAINIGI:   Thank you, Your Honor.

19                  THE COURT:   Thank you all.

20                               -   -   -   -   -

21                   (Proceedings adjourned at 3:34 p.m.)

22                               C E R T I F I C A T E

23                  I certify that the foregoing is a correct transcript  
24      from the record of proceedings in the above-entitled matter.

25                               s/Heidi Blueskye Geizer               November 7, 2019  
                              Heidi Blueskye Geizer                               Date  
                              Official Court Reporter